SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

NO. 109.

WILLIAM HOLDER, PLAINTIFF IN ERROR.

VS.

AULTMAN, MILLER & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the United States Circuit Court for the Sixth Circuit and Eastern District of Michigan, by Aultman, Miller & Co., an Ohio corporation engaged in manufacture of mowers and reapers, against William Holder, one of their local agents, to recover a balance of $5,052.56, claimed to be due it from the said Holder, under his contract with the company.

The defense is that the plaintiff is a foreign corporation and that it has not complied with Act No. 182 of the Laws of Michigan for the year 1891, as amended by Act No. 79 of the Laws of Michigan for 1893, the portion of which that bears on this case reads as follows:

"An Act to provide for the payment of a franchise fee by corporations.

SECTION 1. *The People of the State of Michigan enact*, That every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the Secretary of State and every foreign corporation or association which shall hereafter be permitted to transact business in this State, which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein, shall pay to the Secretary of State a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore organized or doing business in this State which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof: Provided, That the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly ~~paid.~~ void.

SEC. 2. The Secretary of State shall not receive for filing or record the articles of association of any cor-

poration or association unless accompanied by the fee provided for in this act.

Approved July 2, 1891."

That in consequence of these facts the contract is void.

On the part of defendant in error it is admitted that it has not complied with the act in question, but it is claimed that said act is void as a regulation of interstate commerce as applied to this contract. It is also claimed that the contract in question is an Ohio contract, and not within the application of the law.

The case was decided by the court below on an agreed statement of facts, and on the basis of such agreed statement the court made the following findings of facts:

First. On the 29th day of April, 1894, the parties to this suit entered into a written contract, a copy of which, marked "copy of contract," is hereinafter set forth. Said contract was executed, accepted, and approved, as set forth in said contract and in the indorsement on the back thereof.

Second. The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled.

Third. There is a balance due the plaintiff from defendant under said contract of five thousand and fifty-two and fifty-six hnndredths dollars ($5,052.56).

Fourth. Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporate office in the city of Akron, county of Summit and state of Ohio, and having its manufactory at the same place.

Fifth. Aultman, Miller & Company do not manufacture any goods whatever within the state of Michigan.

Sixth. Aultman, Miller & Company sells its goods in Michigan by means of local commission agents, and it has a general agent at the city of Lansing, in Michigan, and its commission agents are under similar con-

tracts with the plaintiff to the one set forth in this action.

Seventh. All contracts are sent to Aultman, Miller & Company, at Akron, for approval or rejection before taking any effect.

Eighth. The goods sold by Aultman, Miller & Company in the State of Michigan and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent or in bulk to Lansing or various points throughout the State and reshipped in smaller lots direct to the commission agent.

Ninth. Aultman, Miller & Company own a warehouse in the city of Lansing for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

Tenth. Accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh. The plaintiff effects settlements with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and his assistant check over the season work with the commission agent, collect pay for the machines sold in notes or cash or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth. All notes taken by the commission agents of Aultman, Miller & Co. are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed and retained until just before maturity, when they are sent direct to banks

or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth. Aultman, Miller & Co. has never filed a copy of its articles of association in the office of the Secretary of State of the State of Michigan, or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan or in any way complied or attempted to comply with section one of an act of the Michigan legislature entitled "An act to provide for the payment of a franchise fee by corporations," approved July 2, 1891, as amended by act No. 79 of the public acts of Michigan of 1893, approved May 13, 1893 (Public Acts 1891, p. 240; Public Acts 1893, p. 82), and which said section one, as amended, reads as follows: (The act referred to has already been quoted in this statement of the case, and is therefore omitted here.)

The copy of the contract referred to appears at large in the record, and may be briefly summarized as follows:

"This agreement, made this 20th day of February, A. D. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the state of Ohio), of Akron, Ohio, of the first part, and William Holder of Laingsburg, county of Shiawassee, and State of Michigan, of the second part, witnesseth; That the party of the second part is hereby authorized to sell Buckeye mowers, reapers, and binders, and extra parts thereof," in Laingsburg and vicinity, and certain other specified territory during the season of 1894. The party of the second part agrees: First, to use all reasonable diligence in canvassing and supplying said territory with said machines. Second, to sell at retail list prices; to grant credit only to persons of responsibility; to use blanks furnished by first party; to require mortgage in case of doubtful responsibility and to redeem all notes not accepted by party of the first part. Third, to endorse notes given by renters and parties owning no

real estate unless sufficiently secured. Fourth, to hold all machines received on commission "on special storage and deposit as the property of the first part until converted into notes or money," these notes then to remain the property of first party, and where machines are sold for cash to promptly remit the cash. Fifth, to see that machines sold are properly set up and started and to keep a record of sales. Sixth, to pay freight on all shipments, keep goods insured, keep all unsold goods housed and cared for, and make no charge for handling or storage. Seventh, to furnish repairs free only in case of flaw or defect. Eighth, to make prompt and accurate reports of machines on hand and unsold, and to promptly transfer such machines at settlement, or in case of failure so to do, to pay for them. Ninth, to sell no other machines. Tenth, "to sell and deliver all machines set up and used as samples or settle for same in cash or approved notes at settlement time." Eleventh, to advertise the agency.

The party of the first part agrees: First, to furnish "to said second party such machines of the kind they make as may be wanted to supply said territory so long as their stock on hand shall enable them to fill their orders," no commission to be due until full settlement of account is made. Second, to allow certain specified commissions as compensation "for receiving, handling, storing, selling, setting up and starting machines and making collections whenever required." Third, to furnish second party a stock of repairs for sale on commission. Fourth, to sell knives, sickles, etc. to the agent at a discountof 50 per cent. Fifth, to furnish second party blank notes and printed matter as required.

A notice which is made a part of the contract provides that a canvasser or expert may be sent to aid in sales, to make settlements or to collect, but that "all

sales made by him will be subject to your (the agents) approval or rejection, nor will any promise not authorized in writing by our manager at Lansing, Michigan, be recognized at settlement."

"In witness whereof the parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.
By D. C. GILLETT.
WM. HOLDER.

This contract not valid unless countersigned by our manager at Lansing, Mich., and app. at Akron.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, Manager.

Across the back of said contract are the words, "Approved April 29, 1894. IRA M. MILLOY, Secretary."

FINDINGS OF LAW.

On the above and foregoing findings of facts the court found the following conclusions or findings of law:

"1. The business of Aultman, Miller & Co. as carried on under and in pursuance of the said contract is an interstate commerce business, and said company is not subject to section one of the Michigan franchise-fee act of 1891, as amended by act No. 79 of the public acts of Michigan of 1893, and said last named act is, so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co. which are doing in Michigan an interstate commerce business, is in conflict with the provision of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes.

2. Said contract was made and executed in the state of Ohio and is an Ohio contract, and it does not pro-

vide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is therefore within the protection of the constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56, with interest, at six per cent, from Nov. 3, 1894, and a judgment will therefore be entered in favor of the plaintiff and against the defendant for $5,212.56 and costs of suit, to be taxed."

Which conclusions of law were duly excepted to. The court also made general findings which appear in the record, and to which also exception was duly taken, and the case was removed to this court on writ of error.

SPECIFICATION OF ERRORS.

1. The court erred in holding that "the business of Aultman, Miller & Co. as carried on, under and in pursuance of the said contract, is an interstate commerce business, and said company is not subject to Section 1 of the Michigan franchise-fee act of 1891, as amended by act No. 79, of the public acts of Michigan of 1893, and said last named act is, so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co., which are doing in Michigan an interstate commerce business, is in conflict with the provision of the Constitution of the United States, authorizing Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes."

2. The court erred in holding that "said contract was made and executed in the state of Ohio and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is therefore within the protection of the Constitution of the United States."

3. The court erred in holding that "defendant was not a resident local agent of the plaintiff, but was an itinerant vendor."

4. The court erred in holding that "the statute of the state of Michigan imposes a tax upon the corporations included within its provisions for the privilege of selling their wares in Michigan, and is therefore a tax upon interstate commerce within the provisions of the Federal Constitution."

5. The court erred in entering judgment for the plaintiff and against the defendant.

6. The findings of fact do not support the conclusions of law.

ARGUMENT FOR PLAINTIFF IN ERROR.

It is well settled that a corporation has no legal existence outside of the state where it is chartered, and that it can make no valid contracts in another state unless permitted by interstate comity, and this is never extended where the policy of the state forbids.

Bank of Augusta vs. Earle, 13 Pet. 519.
Horn Silver Mining Co. vs. New York, 143 U.S. 305.
Paul vs. Virginia, 8 Wall. 168.

There is no claim in this case that defendant in error is engaged in Federal business. The only question at issue then, is as to whether this contract is protected by the clause of the Federal Constitution giving Congress power to regulate commerce.

It is claimed on the part of defendant in error that this contract was one for the transaction of interstate commerce, and therefore that a statute which declared it void would be an interference with such commerce and a violation of the Constitution. It becomes necessary therefore, to examine the contract and findings

of facts in the case, compare them with the interpretation of this clause of the Constitution by the courts, and see if the claim can be sustained.

I.

What were the powers and duties of Holder under this contract as shown by the findings of facts and the contract?

1. He had full authority to sell and not merely to take orders.

The opening paragraph expressly gives him authority to *sell*, and not merely to take orders. He farther agrees: First, "to use all reasonable diligence in canvassing and supplying said territory with said machines." Second, to sell at list prices; to grant credit only to responsible persons, and to redeem all approved notes. Third, to endorse certain notes. Fourth, to promptly remit cash received for sales. Fifth, to keep a correct record of sales. Tenth, "to sell and deliver all machines set up and used as samples or settle for same in cash or approved notes at settlement time." (Rec. pp 19 to 21).

On the part of the company it agrees: First, to furnish second party with machines. Second, to allow him certain commissions for "receiving, handling, storing, *selling*, setting up and starting machines." Third, to furnish repairs for sale on commission. And in the notice at the end of the contract it is specifically agreed that "no canvasser or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you, and *all sales made by him will be subject to your approval or rejection.*"

The contracts referred to in the seventh finding of facts (Rec. p 17), are the contracts mentioned in the sixth finding of facts, namely, contracts with agents.

The tenth, eleventh and twelfth findings of facts (Rec. p 18), show that until after sales are all completed no account of any nature is kept with customers, and then it is only with regard to such notes as may be accepted by the company.

We submit that a fair construction of these provisions of the contract and findings of facts, fully bears us out in the claim that Holder had full authority to make sales, and was not in any respect limited merely to receiving orders. The bargain was to be entirely closed by him, the sale completed, and the machine delivered and set up, and the company held him responsible for the collection of the notes.

2. No goods whatever were shipped direct to customers, but all were sent to the commission agent.

This is explicitly affirmed in the sixth and eighth findings of facts (Rec. p 17). It also follows from the fourth, fifth, sixth and tenth agreements of the second party in the contract (Rec. pp 19 to 21), and the first agreement of the first party (Rec. p 21).

3. Sales were made after the machines reached the agent, and were not in any case completed in Ohio.

With reference to this it appears from the contract that the agent agreed: Fourth, "that all machines and repairs of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the first party until converted into notes or money;" that these notes are to be held "as the property of Aultman, Miller & Co.," and that machines sold are set up and started. This has been sufficiently commented on already. Sixth, " to receive all machines, extras or other goods shipped or delivered on account to said first party," "to promptly execute orders for transfer of machines," and in case of failure in either of these

matters "to pay said first party for all machines remaining on hand at settlement unsold by reason of such failure." Tenth, "to sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time." (Rec pp 19 to 21.)

It seems perfectly clear that these agreements are meaningless unless understood to apply to a stock of machines which are to be shipped to the agent, and which he is to retain and sell on commission, making the sales himself, as referred to above, and that they are entirely inconsistent with any sale completed in Ohio, or where shipment is to be made directly to the purchaser. This is particularly true of the sixth, eighth and tenth agreements.

First party agrees: First, "to furnish said second party such machines of the kinds they make as may be wanted to supply said territory so long as their stock on hand will enable them to fill the orders." This is perfectly clear if all transactions were to be with the agent, but is meaningless as applied to a mere drummer. The third is an express agreement to furnish him a stock of repairs, etc., to be kept and sold on commission. These certainly are not mere orders. (Rec. pp 21 and 22).

The eighth finding of facts (Rec. p 17) already referred to, is equally inconsistent with any other interpretation than that of a shipment to the agent, and a subsequent sale by him. The ninth finding of facts (Rec. pp 17 and 18), concedes that some of the agents keep a stock of repairs on hand for sale on commission. The size of this stock can make no possible difference.

4. The authority given in the first paragraph of the contract, to sell in certain territory, and the first agreement of the agent, to canvass the territory and supply it with machines, might be understood to make him an

itinerant agent, or vendor, but if so, he is an itinerant vendor with a local residence and place of business at the village of Laingsburg (Rec. p 19). The same conclusion follows from the provisions of the contract relating to the storage and care of unsold machines. The sixth stipulation of facts calls him a local commission agent, not an itinerant. (Rec. p 21).

But whether he be considered an itinerant or not, is, as we will try to show hereafter, immaterial. The important point is the character of the business which he transacted; the manner in which sales were made by him.

II.

If what we have stated above is true as to the nature of the business transacted under this contract, then the case is governed by *Am. Harrow Co. vs. Shaffer*, 68 Fed. Rep. 750; *Machine Co. vs. Gage*, 100 U. S. 676, and *Emert vs. Missouri*, 156 U. S. 296.

1. In the last case defendant Emert had been arrested for peddling without a license. The facts showed that he was in the employ of the Singer Sewing Machine Company on a salary, engaged in going from place to place in Montgomery county, Mo., with a horse and wagon soliciting orders for the sale of Singer sewing machines; that he carried with him a new Singer sewing machine which he offered for sale to various persons at different places, and finally sold and delivered. (p 297.)

The court considered at considerable length, the power possessed by states to lay restrictions upon peddlers, and sustained it as a valid exercise of the police power of the state. It also considered the previous decisions bearing upon the powers of sale possessed by foreign corporations and held that these decisions only

sustained the right to sell, First, by the person importing the goods, in the original packages, at the point of destination, as in *Leisy vs. Hardin*, 135 U. S. 100, and *Lyng vs. Mich.*, 135 U.S. 161, and, Second, upon orders, received either by mail or through traveling agents, taken before the goods were in the state, and where the shipment of goods on such orders was made directly to the purchaser. *Robbins vs. Shelby County*, 120 U. S. 489 and *Brennan vs. Titusville*, 153 U. S. 289, the leading cases on drummer's contracts, are expressly distinguished on this ground.

2. Comparing the facts relating to the nature of the business transacted under the contract in question, with the facts in the case of *Emert vs. Missouri*, the powers of the agents in the two cases appear to be identical; both were in the employment of the corporation on a salary; in the case of *Emert vs. Missouri*, it does not appear whether this was a commission or not, but it can make no difference. Both had the power to sell; both travelled through their territory "soliciting orders"; both sold and delivered machines. In neither case is there anything to indicate that any machines were ever shipped directly to the purchaser; in neither case is there anything to indicate that any business was conducted after the manner of the ordinary commercial drummer. It is true it does not positively appear that plaintiff in error did carry machines with him around the country offering them for sale, but, after all, the important question is, as clearly appears from the opinion of the court in *Emert vs. Missouri*, not as to the manner of the offering for sale, but as to the sale itself, whether completed before or after the arrival of the goods in the state. The mere question as to whether the goods were or were not carried around the country and offered for sale, might have a bearing

on the question of whether defendant in error was a peddler or not, and was therefore important in the case of *Emert vs. Missouri*, but not as to the manner in which sales were made, or the place of the sales, or, consequently, their right to protection as interstate commerce.

3. Under this case plaintiff in error is not a drummer, and his business is not a drummer's business.

Brennan vs. Titusville, 153 U. S. 289 and *Robbins vs. Shelby County*, 120 U. S. 489, are the leading cases on restrictions of business transacted by drummers. In both of these cases, as noted in *Emert vs. Missouri*, pp 318 to 319, the decision is made to turn upon the fact that the agent's power was limited to taking orders, which were afterward filled by the principal in the foreign state, and the goods shipped directly to the purchaser. These cases, therefore, as interpreted by *Emert vs. Missouri*, result in defining a drummer as one whose business is confined to taking orders in the manner just stated, and who has no power to conclude sales, the test being the place at which, and the one by whom the sales were completed.

Now, applying this test to the case at bar, we find that Holder was not in any sense of the word a drummer. As already noticed there is not one thing in the case to indicate that he ever took an order in the drummer sense of the word. On the contrary he had absolute and complete power to make sales, so complete that when assistance was sent to him from the home office, all sales made by that assistant or expert were to be referred to him for approval. The whole intent and purpose of the contract is clearly to make the entire responsibility of the sale rest upon the agent, and this intent is consistently carried out in every clause of the contract, even to the extent of requiring him to endorse

the notes taken in the sale of machines, of releasing the company from the acceptance of any notes at all, except such as it may approve, and of requiring him to sell and deliver his sample machines on penalty of being compelled to purchase them himself at the option of the company.

4. The two cases, *Brennan vs. Titusville*, and *Emert vs. Missouri*, cited above, seem to fully sum up the powers of a corporation in respect to making sales within a state in which it is not chartered. They also clearly establish another proposition, namely, that if the power to regulate exists at all, it makes no difference how it is exercised; the question is simply whether the business done is interstate commerce or not. If it is, no direct restriction is admissible. If not, being done by a corporation, any restriction that the state may see fit to impose will be sustained. As said by the court in *Brennan vs. Titusville* (p 299):

"Whatever may be the reason given to justify, or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the National government, it cannot be sustained."

On the other hand,

"Whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists."

Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, 375.

Postal Telegraph Cable Co. vs. Charleston, 153 U. S. 692, 696.

Ashley vs. Ryan, 153 U. S. 436, 440.

Horn Silver Mining Co. vs. New York, 143 U. S. 305, 315.

The only cases in which a distinction is made between a revenue tax on property and a regulation under the police power, is where the property is clearly used in interstate commerce. There the distinction is invoked to sustain the tax on the ground that property located within the jurisdiction of the state is subject to taxation within the state, as other property is taxed, whether employed in interstate commerce or not.

Adams Express Co. vs. Ohio, 165 U. S. 194, 220.
Adams Express Co. vs. Ohio, 166 U. S. 185, 218.
Robbins vs. Shelby County. 120 U. S. 489, 494.
Brown vs. Houston, 114 U. S. 622, 632.
Adams Express Co. vs. Kentucky, 166 U. S. 171, 180.

The principle being, as stated in *Welton vs Missouri*, 91 U. S. 275, that the commercial power of the United States "protects it even after it has entered the state, from any burdens imposed *by reason of its foreign origin.*" (p 282.)

No distinction, then, can be made as between the case at bar and *Emert vs. Missouri*, on the ground that one is a tax upon peddlers, and the other a requirement that foreign corporations doing business in the state shall file their articles of association, and pay a franchise fee as conditions precedent to the right to make retail contracts. In both cases the effect, and the clear intent is precisely the same, namely, in the first to protect the citizens of the state against irresponsible peddlers, in the second to protect them against irresponsible corporations. Both cases have a license fee attached which does not in any way change the police character of the law, but, as already seen, if it did it would make no difference whatever.

The cases just cited above, especially that of *Adams Express Company, vs. Ohio*, and the same vs. *Kentucky*,

also emphasize strongly the fact that the real test of whether a tax or regulation is a regulation of interstate commerce or not, is the question of discrimination, which is entirely absent from the case at bar.

III.

But it may be contended that a large proportion of the business done here by Aultman, Miller & Co. under this contract is interstate commerce, and that therefore the contract must be protected. This does not follow. If the company places itself within the reach of state law at all, it must submit to such conditions as the state sees fit to exact.

In the case of *Postal Telegraph Cable Co. vs. Charleston*, 153 U. S. 692, the facts showed that the Postal Telegraph Cable Co. had an office in the city of Charleston, and transacted some local business there, but the amount was very insignificant as compared with its total business, yet the license was sustained.

In *Osborne vs. Florida*, 164 U. S. 650, a law of Florida imposed a license tax upon "all express companies doing business in this state," the amount of which was regulated, not by the amount of business done, but by the size of the place. (p 653). The supreme court of Florida had construed the law as limited strictly to business done within the state, or "local" business. (p 654). The stipulation of facts showed that ninety-five per cent of the business done by the company was interstate commerce, and only five per cent "local." (p 651). The court, however (p. 654), distinguished the case of *Crutcher vs. Kentucky*, 141 U. S. 47, on the ground that in that case the act had "prohibited the agent of a foreign express company from carrying on business *at all* in that state without first obtaining a license," and

thus prohibited interstate as well as local business, and then said (p 655):

"It has never been held, however, that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute."

In *Horn Silver Mining Company vs. New York*, 143 U. S. 305, the court refused to consider the fact that the greater part of the company's business was in a foreign state and said (p 317):

"There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the state, according to the amount of its business or capital without the state. That is a matter, however, resting entirely in the control of the state, and not a matter of Federal law; and with which, of course, this court can in no way interfere. * * * The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company."

In *Pembina Silver Mining Co. vs. Pennsylvania*, 125 U. S. 181, the statute imposed a license fee on corporations that maintained an office within the state "for the use of its officers, agents and employees." The

validity of this tax was sustained, and the court did not consider the amount of the business transacted in the office. This case must be distinguished from a later one brought under the same statute, where it appeared that the office was kept exclusively for purposes of interstate commerce.

These cases show clearly that where a corporation is engaged in both interstate and local business, a law regulating its business will only be held unconstitutional when it applies to *both* the interstate and local, and that if the effect of the law is confined to the local business and it appears some local business is being transacted, the remedy, if it exists at all, must be found in the legislature.

IV.

But if the business to be transacted under this contract is not such as to be protected by the Constitution, it can hardly be claimed that this contract is in itself an act of interstate commerce, and entitled to protection.

Commerce has been defined as intercourse for the purposes of trade, "including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states."

Welton vs. Missouri, 91 U. S. 275, 280.
County of Mobile vs. Kimball, 102 U. S. 691, 702.
McCall vs. California, 136 U. S. 104, 108.
Gibbons vs. Ogden, 9 Wheat. 1, 189.

It cannot be said that the making of a contract of employment is trade, or that it is in any manner connected with the buying, selling or transportation of commodities, or the transportation of persons between

the states. Moreover, many limitations have been placed upon this definition, for example, in *Paul vs. Virginia*, 8 Wall 168, 183, it was held that insurance policies are not articles of commerce, and the reason assigned by the court was that:

"These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not interstate transactions though the parties may be domiciled in different states." (p 183.)

See also *Hooper vs. California*, 155 U. S. 648, 654.

But for the same reasons a contract of employment should not be considered as commerce.

In *United States vs. E. C. Knight Co.*, 156 U. S. 1. it was held that the American Sugar Refining Co. in buying all the refineries in the country and thus getting entire control of the manufacture and sale of refined sugar, was not interfering with interstate commerce, for the reason that "commerce succeeds manufacture and is not a part of it." (p 12.) Farther on the court says (p 13):

"Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time

when the article or product passes from the control of the state and belongs to commerce."

But does not a contract employing a person as agent to sell goods just as much "precede commerce," and is it any more a part of it? The law does not absolutely prohibit these contracts, but if it did, would it any more completely control trade or commerce than would the complete monopoly of manufacture that existed in the case cited?

In *Brown vs. Maryland*, 12 Wheat. 419, sales by peddlers and at auction are expressly excepted as not within the protection of the Constitution. Speaking of auctioneers, the court says (p 443):

"Auctioneers are persons licensed by the state, and if the importer chooses to employ them he can have as little objection to paying for these services as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation without annexing to it also, the privilege of using the officers licensed by the state to make sales in a peculiar way."

But since auctioneers were licensed and there was no right to sell at auction except by employing a licensed auctioneer, the effect would be to prevent sales at auction at all unless the license were paid. (Of course the original package sales are not considered.)

In this respect this case seems to be clearly in point. The law would operate simply as a restriction not upon the sale, but upon selling in a peculiar manner, viz., by agents in one case, by auctioneers in the other.

In *Woodruff vs. Parham*, 8 Wall. 123, a non-discriminating tax was sustained even against sales in original packages, and the language of the court in that case is quoted approvingly by Mr. Justice Gray in the case of *Emert vs. Missouri*, 156 U. S. 296, 314.

So, also, the property of a corporation may be taxed the same as other property in the state even though it is wholly employed in interstate commerce.

Adams Express Company, vs. Ohio, 165 U. S. 194, 226.

In *Pittsburg & Southern Coal Co. vs. Louisiana*, 156 U. S. 590, 598, the question at issue was whether a foreign corporation could be compelled to employ the official gager appointed by the state, to gage coal brought in from other states and remaining the property of the corporation. It was held that this was not an interference with interstate commerce and that the right of a state to make and enforce this regulation would be sustained. The court (p 598), after recognizing the fact that a state has no power to restrict commerce, quotes approvingly *Sherlock vs. Alling*, 93 U. S. 99, 102, as follows:

"In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

And again (p 599):

"Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution.

See also Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, 374.

Summing up these cases, the conclusion would seem to be that unless it appears that the tax or license or conditions on which business may be transacted, or whatever the form of regulation may be, operates as a direct interference with interstate commerce, it will not be held to be a restriction upon interstate commerce; that a state has the authority to make such laws as it

deems necessary in good faith for the protection of the life, health and property of its citizens, even though they may indirectly affect interstate commerce, but that it cannot under the disguise of a police regulation, discriminate against it.

But there is no question of discrimination in this case. The same restrictions precisely are laid upon home and foreign corporations. Neither can it be said that this is a direct restriction upon the power of sale. The language quoted above from *Brown vs. Maryland*, applies very closely. It is not the right to sell that is restricted. The company has a perfect right to sell its goods in Michigan by means of drummers or mail orders but the law simply says that it shall not make contracts of employment in this state without filing its articles of association and paying its franchise fee, and that if it does, the state of Michigan will not enforce such contracts. Our claim is, then, that when the United States protects the corporation in the power of sale, it is sufficient, without adding to that the power to make contracts of employment.

V.

The case of *Coit vs. Sutton*, 102 Mich. 324, has been relied upon as decisive of this case; but the opinion in that case must be read in connection with the facts, and from those it appears "that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that state *to its customers* in Michigan, on orders given by mail or taken by its agents in Michigan." These facts put it exactly on the line of *Brennan vs. Titusville*, 153 U. S. 289, and *Robbins vs. Shelby County*, 120 U. S. 489, and entirely outside of *Machine Co. vs. Gage*, 100 U. S. 676, and *Emert vs. Missouri*, 156 U. S. 296. It was the regular "drum-

mer's" order, nothing more nor less. The goods were shipped direct to the customer, and were tendered to him in Michigan and were refused by him there. The sale was completed in the foreign state. It is true that read entirely apart from the facts in the case, the language of the opinion where it says that the act is limited "to foreign corporations whose business within this state consists merely in selling through itinerant agents and delivering the commodities manufactured outside of this state," might possibly be given the construction contended for by defendant in error.

But, as shown by the facts, the agent had no power to sell but simply to take orders. Notice also that the court does not say " selling and delivering through itinerant agents," but "selling through itinerant agents and delivering," the delivering being direct to the purchaser, and not through the agent. The same conclusion follows from an examination of the cases cited by the court in support of the opinion. The whole transaction was an ordinary drummer's sale, nothing more nor less, and does not in any manner correspond with the acts performed under the contract in question.

5. It follows that the business of Aultman, Miller & Co. as carried on under this contract in this state, is not within either of the powers mentioned above; that it is not selling by itinerant agents, whose powers are limited to the negotiation of sales before the goods are introduced into the state, and in which the sale is completed by the shipment of goods directly to the purchaser, nor is it a sale in the original packages by the person importing, at the point of destination. It is, therefore, not interstate commerce, and the principal upon which the case of *Emert vs. Missouri* rests applies to this case. The business done is purely a local busi-

ness; it is not a transaction which starts in Ohio and ends in Michigan. The contract of sale as a contract has its inception, its completion and its performance entirely in Michigan. The place of payment is also in Michigan. Every sale made by the agent under this contract, as necessarily follows from the findings of facts and the contract, is entirely a local transaction, and therefore has no claim to protection under the interstate commerce clause of the Constitution.

6. As has been said by this court in many cases, it is difficult to draw an exact line where the powers of the state leave off and the powers of the Federal government begin, but the limit as established in these cases is as distinct as any that can be found. It seems to be clearly defined by the two cases above cited, and we believe should be resolutely adhered to. If any farther power of sale is conceded to the corporation, it will become practically impossible to set a limit. It is easy to determine whether a sale is made on orders taken by a drummer, or in original packages at the point of destination, or not; but if we go farther and give authority to sell in any other manner, it becomes practically impossible to draw a clear dividing line.

Supposing it were attempted to make a distinction in the manner of making sales as to whether the sale was made by peddlers or by one having a local residence and place of business; this would be about the smallest step that could be taken in advance of the present position, but having taken this it becomes a matter of exceeding difficulty to determine just how any particular sale was made. Moreover, there is no distinction of principle between sales by peddlers and sales by a merchant. In both cases the contracts are purely local, and if once the policy is adopted of recognizing and protecting a local contract in any manner, it becomes

impossible to find a legitimate place to stop. It is comparatively easy in examining a contract of sale to determine from the circumstances of the case where delivery is made and title passes, and therefore whether the sale is completed in the home state or not, and then to let the question of protection turn upon this. Farther than this it is difficult to find a clear principle on which to rely.

IS THE CONTRACT PROTECTED BY ITS PLACE OF MAKING?

But it is claimed that the contract in question was made and executed in the state of Ohio, and is an Ohio contract; that it does not provide for the transaction of any business in Michigan other than an interstate commerce business, and that the defendant in error is therefore within the protection of the Constitution of the United States.

We have already attempted to show that the business provided for by this contract is not interstate commerce, but the conclusion of law referred to above raises the question as to whether this contract is, in law, an Ohio contract in such sense of the word as to make the contract itself an act of interstate commerce and entitled to protection.

I.

The contract is not an Ohio contract.

The general principle governing the place of a contract is that:

"Obligations, in respect to the mode of their solemnization, are subject to the *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws when foreign are to be adopted, and in all cases not specified above supplies the applicatory law."

Wharton Conflict of Laws, Sec. 401p.

But the question in this case is not whether the contract was made with the proper formalities or not, nor what shall be the manner of its performance; but it is whether the contract was valid or not, and whether this state must adopt and apply the laws of the foreign state. Therefore, under the rule just stated, the contract must be governed in these respects by the *lex loci contractus* and the *lex fori.*

"The phrase, *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman vs. Southard,* 10 Wheat. 1, 48, where he defined it as a principle of universal law,—'The principle that in

every forum a contract is governed by the law with a view to which it was made'."

Pritchard vs. Norton, 106 U. S. 124, 136.

It would be difficult to find a stronger case than the above to illustrate the doctrine for which we contend. Plaintiff had become security for costs for defendant in a suit in Louisiana. Defendant had given him an indemnity bond, which was made, executed and delivered in New York, and by the laws of that state it would have been void. But the court held that since the services for which the bond was an indemnity had been rendered in Louisiana, the contract was subject "in all matters affecting its construction and validity, to the law of that locality."

Moreover, the question at issue was not the construction or interpretation of the contract, but its validity. This would seem to be a sufficient answer to the argument that in the case at bar the question is one of validity, and therefore the place of the contract must be determined by the place of execution. It might also be added that there can be no clear separation between questions of construction or interpretation, and of validity, as far as the test by which they are to be determined is concerned. Each must depend upon the seat of the obligation, and this must be determined by all the circumstances of the case, and not by the mere place of execution, which might be only the result of accident, and if of importance at all, is only so as determining the formalities attendant upon the making and execution of the contract.

"If a contract is made in one state or country, and is to be performed in another, it will be presumed that it was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation and effect of the contract."

1 Beach on Contracts, Sec. 592.
Story Conflict of Laws, Sec. 280.
Andrews vs. Pond, 13 Peters (U. S.) 65, 78.
Wayman vs. Southard, 10 Wheat. (U. S.) 1, 48.
Lamor vs. Micou, 114 U. S. 218, 220.
Watts vs. Camors, 115 U. S. 353, 362.
Coghlan vs. South Carolina R. R. Co., 142 U. S. 101, 109.
Jones Construction of Commercial & Trade Contracts, Sec. 25 and 26, and cases cited.

"The place of the performance of a contract is regarded by the law as supplying the most positive indication of the intention of the parties as to the law which they have desired to incorporate in their agreement; and it is upon the assumption that the contract is to be performed at the place where it is made, that the place of making is referred to for the interpretation of its terms."

Jones Construction of Commercial and Trade Contracts, Sec. 26.
See also to the same effect, 2 Parsons on Contracts, 8 Ed. pp 696 et seq.

But by this test the contract is a Michigan contract, since it is to be performed entirely in that state.

But the intent of the parties will not always control. This is noticed in *Pritchard vs. Norton* cited above, and the case at bar offers an exception exactly in point, namely, where it appears that the direct effect of the change of place of the contract, if not its express intention, was to enable one of the contracting parties to evade or violate the laws of the state in which the contract is to be performed.

Again. The law of the forum determines everything relating to the remedy, including the existence of any remedy at all, since it is a principle too well established to need citation, that no state will enforce a contract made in violation of its own laws or contrary to its

policy. The application of this principle, while not formally making the contract void, would have that effect, for it would deny a remedy. Thus, in the case of the Statute of Frauds, "it has been held that an action cannot be maintained upon a parol agreement, which is not to be performed within a year, although made in France, and valid and enforceable there."

Wood's Law of Master and Servant, 2 Ed. p 385, Sec. 194.

Smith Master and Servant, 36.

But applying either of these tests,—the place with regard to which the contract was made, or the place of the forum,—and the contract is a Michigan contract within the intent of the statute, and cannot be enforced in this state.

According to the terms of the contract itself, it was "made this 20th day of Feb. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the state of Ohio), of Akron, Ohio, of the first part, and William Holder of Laingsburg, county of Shiawassee and state of Michigan, of the second part." (Rec. p 19.) It was executed by both parties on that day. (Rec. p 22.)

It was countersigned by the general agent of the company, Feb. 27, 1894 (Rec. p 23), and all of these acts were done in Michigan. The entire performance of this contract was to be in Michigan. This clearly appears from the contract itself. (Rec. pp 19 to 23.) It was not to be executed by the plaintiff in Ohio, but simply approved, and as a thing cannot be approved that has no existence, it must have been completely executed before approval. (Rec. p 23.) Holder was given full and complete authority to *sell*, not to take orders. (Contract, Clause 1, Rec. p 19. Notice Rec.

p 22.) All settlements and payments for services are made in Michigan, although accounts are kept in Akron. (10th and 11th Findings of Facts, Rec. p 18.)

Summing up, every one of the provisions of the contract relates to Michigan and no where else, as the state with reference to which it is made and where it is to be performed, and it is therefore a Michigan contract and within the application of the law. Also, if defendant in error is to have any remedy for the breach of this contract by plaintiff in error, it must be in the courts of Michigan. This follows from the very nature of the contract. Now a state will not enforce a contract made in violation of its laws; it follows that the law of the forum would in this case determine the validity of the contract, since it must determine the existence of a remedy. In other words, the place of this contract for the purpose of this case would be the place where the action is brought for its breach, and this also makes it a Michigan contract.

II.

The condition, "this contract not valid unless countersigned by our manager at Lansing, Mich., and approved at Akron," cannot make it an Ohio contract.

1. It is contended that the effect of this condition is that the contract is incomplete until ratified or approved in Ohio, and that until that approval it has no binding force; that, therefore, the act which gives it validity is performed in Ohio, and that this fact makes it an Ohio contract.

This argument ignores the distinction between the acceptance of an offer and the approval of an act. The contract in this case is not *incomplete*. There are no new conditions to be added, there is no change of substance to be made. The company does not reserve the

right to modify this contract, it can simply accept or reject it entirely. It is not the case of the ordinary commercial or trade contract, where the agreement itself is formed by correspondence between the parties, but is simply an offer on the part of the vendee, which is accepted by the vendor at his place of business, and performed also in the state of the vendor by the delivery of the goods to the carrier. Neither is it the same case as where a proposal is made through an agent of the vendor, who has only power to receive offers, but no authority to accept them or make contracts. In either of these cases, applying the principle laid down at the outset for determining the place of a contract, the place of this contract is clearly at the residence of the vendor, for it is there that the contract is actually entered into and performed. The order, even if signed by the vendee, is not a contract, for it is only signed by him, and not by the vendor. Both the execution and performance of the contract, in other words, are in the state of the vendor, and not that of the vendee.

Not so in this case. This contract was "made and entered into" in Michigan. (Contract, Rec. p 19). It was signed by both parties in Michigan (Rec. p 23); it was countersigned by the general agent in Michigan (Rec. p 23). It was therefore a completed contract, and in no sense of the word an offer. The power of the agent was not limited to exhibiting samples, and receiving an order, but was to make a contract subject merely to a condition precedent.

The effect of approval, then, is not to make a new contract, or to make a contract at all, but to ratify or accept on the part of the home office of defendant in error, the act of its agent performed in the state of Michigan.

2. The same thing follows from the use of the word "approval." We *accept* an offer, we do not approve or ratify it. In other words the word "approval" is practically synonymous with the word "ratification," and signifies in every case the acceptance of a completed act, and never applies to an incomplete one.

"The term 'approved' is only appropriate to a revisory proceeding."

Thaw vs. Ritchie, 5 Mackey (D. C.) 225.

"The meaning of the word is 'to be satisfied with; to commend, to accept.'"

2 Am. & Eng. Enc. of Law, 2 Ed. 519, and notes.

Approve, "To accept as good or sufficient for the purpose intended."

Anderson's Dictionary of Law.

Approval, "The act of a Judge or Magistrate in sanctioning and accepting as satisfactory a bond, security, or other instrument which is required by law to pass his inspection and receive his approbation before it becomes operative."

Black's Law dictionary.

Approved securities must be complete in every respect before they can be submitted for approval. A governor of a state approves a statute, and this gives it validity, but it must be completed and passed before approval, and might even become a law under certain circumstances, without it. A tax roll is approved by the Board of Supervisors, but it is made by the assessors.

An approval of a will was held to have the effect of a republication.

Rich vs. Cockell, 9 Ves. Jr. 369.

To make this a mere offer of an incomplete contract, subject to acceptance, and which would be executed in Ohio, it should have been signed only by plaintiff in

error in Michigan; but it is fully conceded in this case that every act performed by the agent of defendant in error in this state, including the signing of the contract, was fully authorized by said defendant in error.

Declaration, Rec. p 1. Contract, Rec. p 41, 45. Notice Rec. p 45.

3. "A mere formal ratification of a contract in a different state from that in which it was substantially made, is not sufficient ground for construing the contract according to the law of the place where it is ratified."

Jones on Construction of Commercial & Trade Contracts, Sec. 25 and cases cited.

And an examination of the context will show that in the mind of the author "construction" covered also the question of validity. The same follows from the use of the word in the cases already cited.

Palm vs. Medina F. Ins. Co., 20 Ohio, 529, was a case where plaintiff had applied for fire insurance on a building. The blank application contained the provision that:

"All policies of insurance are issued from the office of the company at Medina upon application sent in by agents and others, and if approved, will bear date of the reception of such application." (p. 537.)

It was held that the contract was complete as made by the agent, and for that reason valid, although the application did not reach the company until after the fire.

"A ratification, also, when fairly made, will have the same effect as an original authority has, to bind the principal, not only in regard to the agent himself, but in regard to third persons. * * * In short, the act is treated throughout, as if it were originally auth-

orized by the principal; for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy."

Story on Agency, Sec. 244.

"The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. And this rule applies as well to corporations as to individuals."

Mechem on Agency, Sec. 167.

"The effect of a subsequent ratification is that it *relates back* and gives validity to the unauthorized act or contract, as of the date when it was made, and affirms it in all respects as though it had been originally authorized. This principle is tersely expressed in the proposition that a ratification is equivalent to an original authorization."

4 Thomp. Corp. Sec. 5289.
See also Golson vs. Ebert, 52 Mo. 260, 271.
Lyall & Teller vs. Sanbourn, 2 Mich. 109, 114.
Cook vs. Tullis, 18 Wall. (U. S.) 332, 338.

The case of Shuenfeldt vs. Junkerman, 20 Fed Rep. 357, 359, appears to be an exception to this rule, but an examination of the case will show that the rule was approved, but the decision was rested on the ground that the sale had been completed and the contract made in the foreign state by the delivery of the goods to the railway company; but even this is questioned in *In re Ins. Co.*, 22 Fed. Rep. 109, 113, in which case the court says, speaking of Shuenfeldt vs. Junkerman, that:

"The court strained the rule in that case to uphold the contract and prevent the success of an unfair proceeding." And, referring to the contract then in question, "the ratification, if ratification were made, relating back to what took place in Canada, it must be held

therefore, that the contract was made in Canada, and, as a necessary result, that the case must be determined by Canadian law."

Applying this doctrine to the case at bar, it follows that when defendant in error approved the contract, it left it complete and perfect as executed, and where executed, by the agent. That is, that the act of approval places the contract in exactly the same situation, and makes it a contract of exactly the same place and time, as it would have been had it been originally executed by the agent, with full authority and without any requirement of, or necessity for, approval.

If the agent had had full prior authority to make this contract and no approval had been required, it would certainly have been a Michigan contract. Now if approval places it in the precise situation in all respects which it would have occupied had there been such authority, it must also make the contract a Michigan contract.

4. But it may be said that this is not a ratification, but that the contract before approval must be taken as a whole, and therefore held to be merely an offer to make a contract, which is executed on the part of the defendant in error by approval in Ohio, exactly as in the case of an ordinary sale through drummers. We do not believe this position to be correct, but even if it were true that the contract must be held to have been executed by defendant in error in Ohio, it does not follow that that makes it an Ohio contract, or that the approval has any other force than that of ratification.

In *Findlay vs. Hall*, 12 Ohio State, 610, defendant had given a note which was a New Mexico obligation. After part payment of the note, two of the defendants in renewal of the balance still due, gave a new note, which, after having been signed by them was sent to

the third defendant in Missouri, and there signed and delivered. The question was on the place of the contract. The court below had charged the jury that they might "look at the whole facts of the case and might say whether defendant regarded and treated it as a New Mexico contract, and if he did so regard and treat it, then it is a New Mexico contract and is governed by the laws of New Mexico, and not by the laws of Missouri."

This charge was approved and the signature of the third partner was held to be, not the making of a new agreement, but a ratification of the act of his co-partners in renewing the old, and not as transferring the seat of the contract to Missouri.

Pugh vs. Cameron's Administrator, 11 West Virginia, 523, was a case in which plaintiff, a resident of West Virginia, had agreed in Ohio with one of the defendants, a resident of Ohio, to pay defendant's debt, in consideration of which defendant had agreed to give his note for the amount with his brother Samuel, a resident of West Virginia, as surety.

A non-negotiable note was made by Joseph in Ohio after plaintiff had paid the debt, and was given by Joseph to plaintiff, who took it to West Virginia, where Samuel signed it. This note having been executed by one of the defendants and delivered in West Virginia, the claim was made that the note was void for usury, the law of West Virginia forfeiting the entire debt for usury. But the court held that when Samuel signed the note in West Virginia, "he ratified the contract made in Ohio," and it was therefore an Ohio contract.

It thus appears that even such an action as the execution of a promissory note in a foreign state may be shown by the circumstances of the case to be nothing but a ratification, and not to change the place of the

contract, and the fundamental principle upon which these cases rest is the one already stated, namely, that the true test of a contract is its full nature and effect as determined by all the circumstances of the case.

This may be illustrated in another way. The parties were in Michigan when the contract was made, and the contract was to be performed there, as already seen. This would then have been the place of the contract, and it must be assumed that this was the place with reference to the laws of which plaintiff in error, at least, executed the contract, since the clause itself does not directly purport to make it an Ohio contract, and nothing is said anywhere in the contract (aside from the clause in question), about any other place. It follows that the ratification cannot change the place of the contract, for if it did, the minds of the parties never met. The contract having been executed subject to Michigan laws, must be approved subject to Michigan laws, or it becomes a different contract, and as will be seen farther on, would have to be accepted again by plaintiff in error, before becoming of any force against him, which, since plaintiff in error resides in Michigan, would make the execution of the contract in Michigan, and it, therefore, according to the rule contended for by defendant in error, a Michigan contract, since until such acceptance it would be merely an offer entirely unaccepted by plaintiff in error.

Of course if the contract had contained a clause providing that it should be an Ohio contract and governed by the laws of that state, a very different condition of things would exist; but that is not the case, for the clause in question is the only one which in any manner refers to any other state than Michigan, and it is in no sense of the word an agreement to be bound by the

laws of Ohio, and there is nothing to indicate that plaintiff in error so understood it.

It also follows from the langauge of the clause and the facts just stated with regard to it, that this clause must be regarded as merely a condition precedent to the taking effect of the contract. But a condition precedent is no part of a contract; it is something that must be performed and finished before the contract takes effect, but when the contract does take effect, it does so as if the condition precedent had never existed.

Story Conflict of Laws, Sec. 279, a.

Thus, it may be shown by parol evidence.

Ware vs. Allen, 128 U. S. 590, and cases cited.

In the above case the evidence showed that an agreement had been made between plaintiff and defendant that the firm should have an opportunity to consult counsel as to the validity of the transaction, and that if such advice was adverse, then the instrument given by them was to be of no effect. (p 595). Parol evidence was admitted to show this agreement. The court says:

"That it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter."

"It is always proper to prove (by parol evidence) the existence of any separate, oral agreement constituting a condition precedent to the attaching of an obligation of a written contract."

Jones on Construction of Commercial & Trade Contracts, Sec. 157.

See also Stevens Dig. Law of Ev., Art. 90 (3).

This rule rests upon the principle that a condition precedent does not vary or contradict the terms of the written contract. But to change the state with reference to the laws of which the contract is made, and by which it must be governed, would certainly be to vary the terms of the contract, in the most material manner. It follows that the ratification or approval cannot change the place of a contract, or it could not be shown by parol evidence.

5. If ratification is equivalent to full prior authority in a case where an act is performed with no authority whatever, much more must it be so when there is full authority on the part of the agent to do just what he did. It may be argued that this is not ratification, and in the strict sense of the word this may be true, but it *is* approval, and there is just that amount of distinction between the strict meaning of the two words; but there can be no difference as to the effect of either upon the contract; it makes no difference whether you ratify an act done without authority or whether you approve an act done with authority, as to the condition of the act after the approval.

6. The same clause provides for both approval at Akron and countersigning at Lansing. If one could change the place of the contract, so could the other, and if the contract were to be countersigned after it was approved, it would convert it back into a Michigan contract. To state this is to show its absurdity; the two occupy the same relation to the contract—they are conditions precedent, and the contract when it takes effect, does so as if they had never existed.

7. Supposing Mr. Ira M. Milloy, the secretary of the company, had happened to be in Michigan and had approved the contract in that state; would it not have been a sufficient approval although not made at Akron?

And, if so, would it have made it a Michigan contract? Or suppose that the condition had been: "Not valid until after approval at Akron, and the termination of all prior engagements of the party of the second part." Would the fact that the approval was given before the engagements terminated make it any more or less a Michigan contract?

8. All the difficulty seems to arise from slight vagueness in the word "approval." It has sometimes been employed in commercial transactions in the sense of acceptance of a proposition, which is altogether wrong. Acceptance of a proposition *makes* a contract, and may therefore determine its place. Approval of an act or contract can never *make*, but simply *ratify* a contract which is already completed.

It follows that since all that is required in the present case is approval and not acceptance, the rule laid down in Story on Agencies, Sec. 244, exactly applies, and the place of the contract is not changed by the ratification.

III.

It is claimed that the use of the word "made" in the act in question limits it to the place of execution of the contract, or the *locus regit actum* as distinguished from the *locus contractus*. The claim is denied by plaintiff in error for the reason that the word "made" as employed with reference to the place of a contract is not necessarily limited to the *locus regit actum*, but in most cases means rather the *locus contractus*, or real seat of the obligation as determined from all the circumstances of the case.

This follows from the doctrine already laid down with regard to the place of the contract on pages 28 to 32 of this brief. The difficulty seems to arise from

the fact that, as said by this court in the case of Pritchard vs. Norton, 106 U. S. 124, 136:

"The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing."

In that case the court held that the *locus contractus* was not the place where the contract was entered into, which was the state of New York, but that it was the place where it was to be performed, and the validity of the contract turned on that ground. The case is a very important one on the law of place, and there can scarcely be a better statement of the distinction that exists between the place where a contract is entered into, and the *locus contractus*, or place of the contract, than the one therein made by describing the *locus contractus* as "the seat of the obligation." We believe that an examination of the authorities will show that in almost every case this is the sense in which the word "made" is employed in speaking of the place of a contract.

This use of the word "made" is well illustrated in 1 Beach on Contracts, Secs. 585 to 595, inclusive. Sec. 585 lays down the rule that the validity of a contract is to be determined by the law of the place where it is made. The succeeding sections, however, and especially section 592, show clearly that by the word "made" is not meant the place where the contract was entered into, but the place of performance. The same thing appears in Story on Conflict of Laws, Sec. 280, already cited.

So general is the rule that the place of performance is the place at which the contract is in law made, that

most authorities use the word altogether in this sense, and lay down as a general principle that the place of performance is the place of the contract. See for example:

Wharton Conflict of Laws, Secs. 397 to 401.
Andrews vs. Pond, 13 Peters, 65, 77 and 78.

Many other cases might be cited.

In *Pritchard vs. Norton*, 106 U. S. 124, the scope of the *locus regit actum*, as determining the contract, is, as already seen, restricted to the formalities attending, or the mode of solemnization of the contract, in distinction from the substance or validity of the agreement itself.

It is not true, therefore, that the use of the word "made" in the statute restricts its application entirely to the place where it became binding upon the parties. The word must be understood to be employed in its full legal sense, which is the seat of the obligation as determined by the circumstances of the case, of which the place of performance is the most important.

But even this rule of determining the place of a contract must be somewhat qualified. A court will never assist parties in a conspiracy to violate law, still less will it support a foreign corporation in its efforts to force upon the citizens of a state the laws of another state by which they never intended to be bound.

If Aultman, Miller & Co. inserted this clause with the express intention of making the contract an Ohio contract, it could only have been to enable them to evade or violate the laws of the state of Michigan. The contract was made and to be performed entirely under Michigan laws, and with reference to them. Every transaction took place in Michigan. Why, then, should any other laws be held to apply to the contract?

It was not a question of obtaining a greater amount of interest; the only possible reason that can be assigned must be to enable the foreign corporation to do business in Michigan without complying with the provisions of our laws, and the courts will not assist in such an effort.

The rule laid down in *Andrews vs. Pond*, 13 Peters, U. S. 65, 78, then applies, and, as said by the court in that case:

"The question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute."

In that case a bill of exchange had been given in New York for acceptance in Mobile, and it was claimed that usury had been concealed under the name of exchange.

Rowland vs. Building and Loan Association, (N. C.) 18 S. E. Rep. 965, was a case in which a building and loan contract was alleged to be usurious. Defendant resided in North Carolina, where the suit was begun. Plaintiff was a Virginia corporation. The court says:

"Calling it a Virginia contract does not make it one. Sending the application to the "home office," as it is called; remitting the money from Richmond; calling the local board and its treasurer the agents, not of the corporation, but of the members who live in that locality; providing in the bond that it shall be paid in Virginia,—all these things cannot enable the foreign corporation to evade the usury laws of the state."

In other words, if a violation of the law of a state is intended by a contract, the court will not allow it to succeed by a pretended ratification, approval, or even execution in a foreign state.

In *Herschfeld vs. Dexel & Co.*, 12 Ga. 582, one Mjndhime, a resident of Georgia, had made, executed and delivered in New York an assignment of his stock of goods in Georgia. The goods were afterwards attached by creditors of Mindhime. Regarding the validity of the assignment the court says:

"But to give the plaintiff in error the full benefit of his objection, we will admit that this assignment is legal and valid in New York, and would be executed in that state. Still, we are not required by the comity of states, to enforce within our bounds or jurisdiction, a contract made elsewhere, and which not only contravenes the policy, but violates a positive statute of this state." (p 586.)

In *Lewis vs. Headley*, 36 Ill. 433, the parties had entered into a contract in New Jersey, by which plaintiff, a New Jersey bank, was to furnish the Illinois bank with its money in denominations smaller than $5 for circulation in Illinois, which was contrary to the laws of Illinois. The money was sent to Illinois, and defendant gave its notes for the amount, and put the money in circulation. In an action to recover on the notes, it was held that the contract was performed in Illinois, and since the act was in violation of the laws of that state, it was void and would not be enforced, and that a knowledge of the provisions of those laws would be presumed.

See also Hooper vs. California, 155 U. S., 648, 658.

Many other cases to the same effect might be cited, but these seem sufficient to establish the rule that the court will look at the real intent and effect of a contract which is to be performed in the state where suit is brought, and if that intent and effect be to violate or evade the laws of a state, it will refuse to enforce the

contract unless it is protected by the higher law of the Constitution.

But it is perfectly clear that to construe the word "made" as asked by defendant in error, would have just this effect. It would compel the courts of the state of Michigan to enforce a contract, and would validate proceedings and agreements, made in direct violation of its laws, and expressly intended for that purpose.

It also follows that such a construction is entirely unnecessary, since under the cases cited above, the courts of Michigan have a perfect right to refuse to enforce this contract. Can it be presumed that the legislature voluntarily deprived itself of a power it possessed, and tied its own hands, by limiting the application of the law to the place where the contract was entered into or first became binding upon the parties? Or can it be presumed that a construction of the word "made" was intended that would have this effect, when such construction is wholly needless?

2. To construe the word "made" as limited strictly to the place where the contract became binding upon the parties, would be to defeat entirely the purpose of the law.

In *Hooper vs. California*, 155 U. S. 648, it had been argued that in procuring insurance for a resident of the state in a foreign company, the agent acted as the agent of the insured and not of the insurer, and that therefore the contract was made outside the state, but the court says (p 658):

"If the contention of the plaintiff in error were admitted, the established authority of the state to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only

necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the state, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable."

But the effect of considering the insurance agent as the agent of the insured instead of the insurer, or of a clause in the contract making such provision, would be precisely the same as that of the construction of the clause in the contract in question providing for approval in the foreign state, contended for by defendant in error, and the same consequences must follow such construction of the act. The case is therefore closely parallel, and the remarks above quoted are exactly in point.

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Lau Ow Bew vs. U. S., 144 U. S. 47. 59.
Church of the Holy Trinity vs. U. S., 143 U. S. 457.
Henderson vs. Mayor of New York, 92 U. S. 259.
United States vs. Kirby, 7 Wallace, 482.
Oates vs. Nat. Bank, 100 U. S. 239.

Church of the Holy Trinity vs. United States, cited above, was a case arising under the contract labor law. The act in question was, as conceded by the court, strictly within the letter of the law; but applying the

principle stated above, the court held that the intention of the legislature could not have been to extend the provisions of the act to the class of contracts in question, and that the law was not intended to apply to them. There is therefore ample authority for the construction of this word in such a manner as to effectuate, and not defeat the purpose of the law.

3. This act is part of the general system of laws of the state of Michigan for the control of corporations.

In the year 1868, this court, in the case of Paul vs. Virginia, 8 Wallace, 168, said:

"At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states." (p 181.)

These words of Mr. Justice Field may almost have been considered prophetic. It is impossible to exaggerate the dangers that threaten the people of this country from the unrestricted growth and power of corporations, and this court should hesitate long before declaring unconstitutional any measure which seeks to subject them to the control of the state governments.

If these corporations were operating under charter derived from the general government of the United States, it would be altogether different. The power which created, could be relied upon to control them;

but since no state can make its laws effective beyond its own limits, the state in which a corporation is chartered can exercise no effectual control over its actions in any neighboring state, and neither can a state reach to any effect a corporation chartered in a neighboring state, unless that corporation can be compelled in some way to subject itself to its laws.

But to give to this word the construction contended for by defendant in error, would be to take from the state all power to control corporations, for it would be easy to so construct a contract that it would in every case become binding in the foreign state. It would be perfectly possible in this way for a corporation to transact its entire business in any given state without once placing itself within the reach of its laws, or without giving the citizen any remedy against it except by going into a foreign state. No foreign corporation would ever, under those circumstances, file its articles of association in any state other than the one in which it was chartered; it would make no reports; nothing would be known of it, or of its business. The whole situation would be subversive of the interests of the people of this country.

But even if the evil should not go to this extent, still we do not believe this construction can be sustained. The legislature of Michigan must have intended to subject these corporations to state control as far as the Constitution and laws of the United States would permit. It cannot be supposed that they intended to leave this a mere nominal control, as would be the case if the construction contended for is to be used. It follows, then, that the intent of the legislature to restrict the powers of the corporation that might be exercised in Michigan without complying with the provisions of the state law, must have been limited simply by the power of the

state under the Constitution and laws of the United States, and that therefore the law was intended to apply to all contracts which would not be protected by the "interstate commerce" clause of the Constitution, and such a construction should be placed upon the language of the act as will most effectuate this intention, and leave to the state the greatest possible freedom and the most perfect control of its own internal affairs, consistent with the perfect freedom of interstate commerce.

This is not a penal statute to be construed strictly. The statute does not act upon the offender and inflict a penalty; it simply acts upon the offense by setting aside the illegal transaction, and hence is to be construed liberally.

1 Blackstone, 88.

IV.

But even if we use the word "made" in the sense of the place in which the final act which made the contract binding upon both parties was performed, it does not by any means follow that this contract is not within the application of the law.

1. "The power to ratify an act done for and in behalf of another, necessarily presupposes in that other the power to do the act himself, both in the first instance and at the time of ratification; it also presupposes the power in that other to have authorized the doing of the act in the first instance and also to authorize its doing at the time of ratification."

Mechem on Agency, Sec. 111, and cases cited.
Western National Bank vs. Armstrong, 152 U. S. 346, 352.

"It is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. As said in one of the cases cited by counsel,

'the ratification is the first proceeding by which he (the principal ratifying) becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself.'"

Cook vs. Tullis, 18 Wallace (U. S.) 332, 338.
Marsh vs. Fulton County, 10 Wallace. (U. S.) 676, 684.

"To ratify is to give validity to the act of another, and implies that the person or body ratifying has *at the time*, [Italics ours] power to do the act ratified."

Norton vs. Shelby County, 118 (U. S.) 425, 451.

"A transaction originally unlawful cannot be made any better by being ratified."

United States vs. Grossmayer, 9 Wallace (U. S.) 72, 75.

But unless this contract is protected by the "interstate commerce" clause of the Constitution, defendant in error would have had no power to enter into it at the time and place in which it was originally executed. To say that by reserving the right of approval in another state they could make a contract legal and valid which would otherwise have been illegal, is simply to say that they could indirectly ratify an illegal action.

All that would be necessary in any case would be for the corporation to go on and make any contract it sees fit by its agents whether valid or not, reserve the right of approval, and then ratify it in another state, and make it legal. Such an evasion of the law is not entitled to any favor from the courts.

In other words, the position taken by us here is that defendant in error could not approve this contract so as to give it any life or validity, unless it could have originally made it at the time, and in the place at

which it was originally executed between plaintiff in error and defendant in error.

In the case of *Webber vs. Howe*, 36 Mich., 150, plaintiff, an Ohio liquor dealer, had made in Detroit a contract of sale of liquor. He afterward brought suit to recover damages. The defense was the illegality of the contract. The statute avoided all sales and "all contracts or agreements relating thereto." It was argued on the part of the plaintiff that the sale was really completed by acceptance and delivery of the goods in Ohio, and that the contract, being verbal and for more than $50, was void under the statute of frauds, and consequently did not take effect as an agreement until acted on by the delivery of the goods to the carrier in Ohio, and that it was therefore an Ohio contract. But the court held that no matter which view of the case was taken it would not help plaintiff; that:

"If void originally it would not become binding upon the purchaser until he should do something in ratification of it, and it does not appear that anything further was done by him until the liquors were received in this state." (p 154.)

It may be urged that that case is distinguished from the one at bar by the fact that the order was there taken by plaintiff in person, but we think this does not affect the purpose for which we cite the case, which is to establish the rule as stated above by Judge Cooley. In other words that wherever a contract is for any reason void originally, it is not binding upon either party, and an acceptance by one cannot bind the other until he, on his part, does something in affirmance or acceptance of it. The contract as made being void, there is no contract at all in such a case, and the approval, acceptance or shipping of the goods becomes

a mere offer which only becomes a contract by the acceptance on the part of the other party. The last act therefore, which gives it validity is done, not in Ohio, but in Michigan.

3. Applying this doctrine to the case at bar, Aultman, Miller & Co. could not originally have made this contract in Michigan; they could not therefore ratify it so as to give it any validity. Their approval of the contract, then, cannot bind plaintiff in error, until he, in his turn, does something in acceptance of that contract, and it does not appear that anything was done by him outside of the state of Michigan. Under the rule just stated, then, the last thing done which made this contract valid and binding upon both parties, was done in Michigan by plaintiff in error. The contract is, therefore, a Michigan contract, and strictly within the application of the law.

4. Comity has nothing to do with this case. It is too well settled to need citation that the principle of comity will never be applied by a state so as to enforce contracts which are made in violation of its laws, no matter where they are made. If these contracts are enforced at all it is because they are protected by the higher law—the "interstate commerce" clause of the Constitution. Many cases might be cited which apparently rest on the fact that a certain contract was made in another state, and will therefore be enforced; but if these cases are examined, we believe that it will be found universally true that the real reason for affirming the contract was not that it was made in the foreign state, but that *being* made in the foreign state, it was protected by some clause of the Federal Constitution usually either the "interstate commerce," or the "rights and privileges" clause. Wherever the question as to the effect of comity has arisen, the decision has been as

above stated, if the transaction was contrary to the local laws.

It follows that the only protection this contract can have, if it has any, is in the "interstate commerce" clause of the Constitution. It is too well settled to need citation that a corporation can claim no protection from any other part of the Federal Constitution against restrictions upon its trade or intercourse with the citizens of other states. It is not the case of a citizen of a state going into a foreign state and making a contract there; but it is the case where a corporation comes into a state, and there attempts to transact business contrary to the laws of the state.

It is contended that this is a similar case to the contract labor law, and that under that law a vital element of the offense is the making of a contract in the foreign country with a non-resident alien previous to the immigration or importation of such alien into the United States; that there as here, the character of the act is made to depend upon the locality of the execution of the prohibited contract with the alien and the cases of *United States vs. Craig*, 28 Fed. Rep. 795, 799, *United States vs. Edgar*, 45 Fed. Rep. 44, and 48 Fed. Rep. 91, are cited as supporting this doctrine.

While it is true that there must be a contract, the offense is not in the making of a contract, but the encouraging of immigration while under contract.

As we understand these cases the question is not as to the place of the contract, but simply as to whether there was a contract, and if that contract had been made in the United States with an agent of the alien, having full power to contract on behalf of his principle, the encouragement of immigration while under such contract would be just as much a violation of the law. The cases therefore, are not in any respect similar.

V.

But if the contract is void, defendant in error cannot recover in this action.

1. "Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the state. It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction."

Arbuckle vs. Reaume, 96 Mich. 243, 245; 55 N. W. 808.
7 Wait, Act. and Def. p 114.
Myers vs. Meinrath, 3 Amer. Rep. 368, 371.

In the first case a sale was made on Sunday and it was attempted to validate it by making the place of payment of the notes in Ohio.

"The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover, (Citing many cases). In Bank vs. Owens (2 Pet. 527, 539) this court said: 'There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal'."

Miller vs. Ammon, 145 U. S. 421, 426. See also Central Transportation Co. vs. Pullman's Car Co., 139 U. S. 24, pp 54 and 55.

If it be argued that this is oppressive and that it will enable dealers to evade their honest obligations, the answer is:

"The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced."

Coppell vs. Howe, 7 Wallace, (U. S.) 542, 558.
See also Erwin vs. Williar, 110 U. S. 499, 510.
Gibbs vs. Baltimore Gas Co., 130 U. S. 396, 411 and 412.

In this last case the action was on the common counts.

VI.

Plaintiff in error, therefore, claims that neither this contract, nor the business to be transacted under it are acts of interstate commerce; that the contract is a Michigan contract within the intent and meaning of the statute, and that it follows that it is not entitled to protection under Article 1, Section 8, Clause 3 of the Constitution of the United States, and that the decision heretofore rendered in this case should be reversed.

CLARK C. WOOD,
Attorney for Defendant.

No. 109.
Sup. Ct. of Wash. for P. C.
Filed Nov. 17, 1897.
16158.

SUPREME COURT OF THE UNITED STATES.

WILLIAM HOLDER, *Plaintiff in Error,*

vs.

AULTMAN, MILLER & CO., *Defendant in Error.*

Supplemental Brief for Plaintiff in Error

On the question of a right to disregard the contract and recover on the common counts, in addition to the arguments and cases in the brief for plaintiff in error on pages 56 and 57, we beg leave to submit the following:

1. The recovery in this case was not on the common counts, but under the contract. Thus the court says in the third finding of facts (Rec. p, 17):

"There is a balance due the plaintiff from the defendant *under said contract* of five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56)."

The same thing follows from the findings of law whieh make the contract interstate commerce, and therefore valid.

2. This case is exactly within the provisions of How. Ann. Stat. Sec. 8136, which provides that:

"When, by the laws of this state, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law,

and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

Notice here that the prohibition against recovery is as broad as it can possibly be made, and includes every right or obligation express or implied.

3. The courts of Michigan would not permit recovery in any manner, either upon the contract or the common counts.

Seamans vs. Temple Company, 105 Mich. 403, was a case where a foreign insurance company undertook to recover upon an assessment note. In Michigan actions upon notes are brought on the common counts, and the note is introduced in evidence under these counts. The corporation had not complied with the law, and no recovery was permitted. The Court cites the Statute referred to, and also says:

"It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this state. The object is to protect the citizens of this state against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this state."

The intent of the law is precisely the same in the two cases.

People's Mutual Benefit Society vs. Lester, 105 Mich. 717. The record shows this case to have been an action on the common counts brought by a foreign mutual benefit society to recover money which had been paid by policy holders of the company to defendant, an agent for the company, for the use and benefit of the company. No recovery was allowed, on the ground of public policy and the statute above cited.

4. It is true that many cases exist where a recovery has been allowed for money had and received or in some other similar manner, on *ultra vires* contracts made by a corporation. Many of these cases are collected in *Central Transportation Co. vs. Pullman Car Co.*, 139 U. S. 24, cited in our brief, but an examination of these cases shows that in none of them was the contract illegal, and in none of them was the party seeking to recover, a guilty party, or taking advantage of his own wrong. There is a clear distinction between an *ultra vires* and an illegal contract that should not be forgotten in this connection. Where a contract is merely *ultra vires*, the thing itself is proper enough; it is only the manner of doing it that is out of the power of the company, but in this case the whole transaction is absolutely illegal if not interstate commerce, and in such a case the courts will simply have nothing to do with the transaction. They will not affirm the contract, neither will they disaffirm it, but they will leave the parties just where they found them.

5. Neither is it a case of a voidable contract which can only be rescinded by placing the parties in *statu quo*. The contract was absolutely void from its inception, and if not interstate commerce was made for the express purpose of violating the laws of the state of Michigan.

6. An examination of the declaration shows clearly that plaintiff in the court below sought to recover simply on the contract, and that the common counts were only introduced to allow recovery in case some defect existed in the special count.

7. To allow plaintiff to recover on the common counts would be to enable the company to completely nullify the Michigan Corporation Franchise Act. All that is necessary is to make their contracts without any

regard as to whether they are illegal or not; go on and fulfil them on their part, and if the other parties raise the objection that the contract is illegal and void, recover all the benefits to which they would have been entitled under the contract; under the common counts as for money had and received, or on the ground of estoppel. The purpose of the law was to prevent the doing of business by unauthorized companies, but if they can do the business just as well under the common counts, they care very little for the letter of the contract. As has been said by this court again and again, the defense is allowed, not for the sake of the defendant, but for the sake of the law, and the general principle underlying the whole is that no rights can arise in any manner whatever, either directly or indirectly, out of an illegal act; there can be no remedy for that which is illegal.

There is no question in this case as to whether plaintiff might not have recovered in an action of trover or repleven, disregarding the contract entirely. It has not sought to do this.

Respectfully submitted,

CLARK C. WOOD,

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